IN THE

SUPREME COURT

OF THE

UNITED STATES

SAN DIEGO LAND AND TOWN COMPANY,
Appellant,
vs.
JAMES A. JASPER, et al.,
Appellees.

APPELLANT'S BRIEF.

STATEMENT OF FACTS.

This action was brought in the Circuit Court of the United States for the Ninth Circuit, to set aside and declare void an ordinance passed by the Board of Supervisors of the County of San Diego, State of California, fixing and establishing the rates to be charged by the appellant for waters furnished by it to its consumers. The proceedings for the establishment of such rates was had before the Board of Supervisors under a statute providing for the fixing of such rates and for the necessary proceedings for that purpose. The statute provides:

"Whenever a petition of not less than twenty-five inhabitants, who are taxpayers of any county of this State, shall, in writing, petition the Board of Supervisors thereof, to be filed with the Clerk of

said Board, to regulate and control the rates and compensation to be collected by any person, company, association, or corporation, for the sale, rental, or distribution of any appropriated water, to any of the inhabitants of such county, and shall in such petition specify the persons, companies, associations, or corporations, or any one or more of them, whose water rates are therein petitioned to be regulated or controlled, the Clerk of such Board shall immediately cause such petition together with a notice of the time and place of hearing thereof, to be published in one or more newspapers published in such county; and if no newspaper be published therein, then shall cause copies of such petition and notice to be posted in not less than three public places in such counties, and such publication and notice shall be for not less than four weeks next before the hearing of said petition by said Board; such notice to be attached to said petition shall specify a day of the next regular term of the session of the said Board, not less than thirty days after the first publication or posting thereof, for the hearing of said petition, which shall impart notice to all such persons, companies, associations, and corporations, mentioned in such petition, and all persons interested in the matters of such petition and notice. Such Board may also cause citations to issue to any person or persons within such county, to attend and give evidence at the hearing of such petition, and may compel such attendance by attachment."

It will be seen that this statute provides for legal adversary proceedings between the petitioners, whoever they may be, and the company whose rates are sought to be fixed, commencing with the petition for the fixing of such rates and requiring the giving of notice and a regular judicial hearing before the Board of Supervisors. In this the proceedings differ materially from proceedings had for the fixing of rates by city councils and other public bodies within cities and towns, where action is taken by the governing body of such city or town as provided by the Constitution, annually, without the filing of any petition or the giving of notice. We call attention at the outset to this difference in the proceedings, because it affects materially one of the questions involved in this case and decided against the appellant, as we claim, erroneously.

The statute further provides:

"At the hearing of said petition the Board of Supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and pos-

sessed by each person, association, company, or corporation, whose franchise shall be so regulated and controlled; and shall in like manner estimate as to each of such persons, companies, associations, and corporations, their annual reasonable expenses, including the cost of repairs, management, and operating such works; and, for the purpose of such ascertainment, may require the attendance of persons to give evidence, and the production of papers, books, and accounts, and may compel the attendance of such persons and the production of papers, books, and accounts, by attachments, if within their respective counties."

And as to the fixing of the rates by the Board of Supervisors and the basis upon which rates shall be fixed and established, the statute provides further:

"Said Boards of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repairs and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work. In fixing said water rates within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said Board of Supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable, and just, both to such persons, companies, associations, and corporations, and to said inhabitants."

In this case, the petition was filed by twenty-five of the citizens and taxpayers of the County of San Diego, who were not, nor was any one of them, a consumer or user of water from the system of the appellant. The evidence clearly shows that these twenty-five outside parties were procured and induced to file the petition by the consumers themselves, with the sole purpose, as the subsequent proceedings show, of maintaining before the Board of Supervisors that the Board had no power or jurisdiction to fix such rates at all, and

the proceedings had before the Board of Supervisors will show that the question of rates was tried at the instance of parties having no interest in the controversy and acting without the knowledge of the Board of Supervisors in the interest of the water consumers; that a protest was filed by such consumers protesting against the fixing of rates by the Board of Supervisors at all, and that instead of offering any proof upon the question of the rates to be fixed, the whole effort of the consumers who appeared before the Board was to show that they had contracted with the company for rates, and that such rates must stand, and could not be interfered with by any ordinance that might be passed by the Board of Supervisors. The collusive nature of the proceedings was not known at the time of the hearing by the Board of Supervisors, but was clearly established by evidence taken after the case reached the Circuit Court. The suit being brought in the Court below to annul and declare void the rates fixed by the Board of Supervisors, the petitioners being made parties to the action, such petitioners failed to answer, and suffered default to be taken against them. An answer was filed by the Board of Supervisors, evidence taken, and the case submitted, and decided upon the answer of the Board of Supervisors alone. Upon default being taken against the petitioners, the appellant, complainant in the Court below, moved for a decree *pro confesso* against such petitioners, and that upon such decree the rates fixed by the Board of Supervisors be declared null and void. The contention of the appellant was that this being an adversary proceeding instituted by the petitioners, and the proceedings in the Federal Court being in the nature of an appeal from the judgment of the Board of Supervisors fixing such rates, the default of the petitioners, the only parties in interest, so far as the proceedings showed, was an admission of the facts alleged in the bill of complaint, and that upon such confession by default the appellant was entitled to its decree; and this is one of the material questions decided against the appellant in the Court below, and presented by this appeal. The errors assigned are as follows:

1. The Circuit Court of the United States, Ninth Circuit, Southern District of California, erred in holding and deciding that the petitioners who initiated the proceedings before the Board of Supervisors were not the only parties in interest.

2. The said court erred in holding and deciding that upon the entry of default in this court against the said petitioners for failure to answer the bill herein, the complainant was not entitled to a decree setting aside the rates and declaring the ordinance fixing them void.

3. The said court erred in refusing to enter a decree *pro confesso* against the said petitioners and in favor of the complainant and appellant on the default entered against them herein, for failure to answer the bill of complaint.

4. The said court erred in holding and deciding that the ordinance passed by the Board of Supervisors of San Diego County sought to be set aside in this action, was not procured in such a way as to amount to a deception upon the Board of Supervisors.

5. The said court erred in holding and deciding that the rates fixed and established by the ordinance of the Board of Supervisors of San Diego county, complained of and sought to be set aside in this action, were not so unreasonably low as to amount to the taking of the complainant's property without just compensation, contrary to the provisions of the Constitution of the United States.

6. The said court erred in dismissing the complainant's bill of complaint.

7. The said court erred in rendering the judgment in favor of the defendants and against the complainant appealed from in this action.

It will be noticed that these assignments of error present not only the question as to the right of the appellant to a decree *pro confesso*, as prayed for in the bill, but also present fully the case upon its merits, involving the constitutional question as to whether or not the rates so fixed were, in legal effect, a taking of the property of the appellant without due process of law and without just com-

pensation. This case differs materially from cases heretofore presented to the court below and to this court involving the question of the reasonableness of rates in this: that in previous cases where the rates were fixed by city or town authorities, the question was purely one of the reasonableness of the rates, while in this case the Legislature itself has in terms provided what shall be reasonable rates, and making it the duty of the Board of Supervisors to so fix the rates as to return to the owner of the water system *not less than six nor more than eighteen per cent. net upon the value of its property*. This is a material difference that we submit was entirely and wholly overlooked by the learned judge of the court below in passing upon this important question. He treats the case as the others have been treated, as one of the reasonableness of rates to be determined without any legislative direction as to the rates to be fixed. We shall maintain that in this case it was the absolute duty of the Board of Supervisors, under the provisions of the statute, to so fix the rates as to return to the appellant not less than six per cent. net upon the value of the plant and system used for supplying the water, and that it is not a question of reasonable rates, except within the limits fixed by the Legislature, between six and eighteen per cent. We shall further maintain that in this case, a discretion being given to the Board of Supervisors to fix the rates so as to return any amount between six per cent. and eighteen per cent. upon the value of the property, the evidence clearly shows that a rate of six per cent. was wholly inadequate, even if that rate had been allowed; but that as a matter of fact, the rates as fixed by the Board of Supervisors fell far below the rate of six per cent. absolutely required by the provisions of the statute.

ARGUMENT.

I.

THE CIRCUIT COURT ERRED IN NOT ENTERING A DECREE PRO CONFESSO UPON THE DEFAULT OF THE PETITIONERS.

The proceedings before the Board of Supervisors were commenced by petition. Notice of the hearing was given and the question of rates was tried upon evidence produced and argument of counsel. This was in all things a judicial proceeding held before a court sitting as such with the litigant parties before it. The statute under which the proceedings were had provides in terms for a judicial hearing upon petition and after notice given.

Stat. 1885, p. 95.

By section 2 of this act the Boards of Supervisors of the several counties are given jurisdiction to hear and determine the question of rates to be charged. Section 3 provides for the petition and notice. Section 4 provides for the taking of evidence, and what shall be taken into account in arriving at just rates. Section 5 provides for the fixing of different rates for water used for different purposes, and limits the power of the board as to the amount of revenue to be returned by the rates, viz., not less than six nor more than eighteen per cent. on the value of the plant, and that rates so fixed shall be binding and conclusive.

The proceedings in the case were had as provided for in this act. The petition was filed and notice given as the law requires; the parties appeared and gave evidence in support of and against the petition, and the judgment of the court as to the rates found to be reasonable was made and entered of record.

The consumers under the system appeared and made themselves parties for the sole purpose of filing and supporting by evidence a protest against the fixing of rates as provided by the statute, which was signed by their attorneys, filed and presented.

Record, p. 272.

This was a judicial proceeding, conducted in all things according to the usual practice and custom of courts and determined the rights

of the parties in and to the use of the water from the system of the company.

Wulzen v. Board of Supervisors, 101 Cal. 15, 24;

Quinchard v. Board of Trustees, 113 Cal. 664, 669.

It differs materially from the fixing of water rates by city authorities in that this proceeding is adversary in its nature, upon petition and notice, and whatever conclusion is reached fixes and determines the rights of the parties the same as any other judgment of a court.

The cases hold the acts of the authorities, even in cities and towns, where formal judicial proceedings are not provided for, to be judicial.

Jacobs v. Board of Supervisors, 100 Cal., 121, 130.

And this court has so decided.

Spring Valley Water Works v. Schottler, 110 U. S. 347.

In the Schottler case it is said:

"Like every other tribunal established by the Legislature for such a purpose *their duties are judicial in their nature*, and they are bound, in morals and in law, to exercise an honest judgment as to all matters submitted for their official determination."

This being a purely judicial proceeding the petitioners had complete control over it and the Board of Supervisors were acting solely upon their petition and not for the public in a legislative capacity. The petitioners could have dismissed the proceedings, or made other disposition of it precisely as in any other judicial proceeding. They acted by attorney and made various stipulations respecting the evidence and proceedings generally, as they had a legal right to do.

In bringing this suit we made the members of the Board of Supervisors parties defendant. But we are convinced that this was not necessary and we question whether it was even proper practice. It seems to us that the case does not differ from one to set aside a judgment of a court on the ground of fraud. There, although the judgment assailed is the act of the court, the judge of the court is neither a necessary nor a proper party to the action. The party on whose complaint the judgment was rendered is the

real and only party in interest. The same is true here. The petitioners are the judgment plaintiffs. They are the real parties in interest. The members of the Board of Supervisors, if proper parties at all, are only nominal parties in the sense that they have no interest in the controversy.

We submit, therefore, that as the real parties in interest made default, thereby confessing all of the material allegations of the bill, the appellant was entitled to a decree *pro confesso* as prayed for.

And we press this point with the greater confidence, not only in the right of our position in point of law, but in the justice of it, because the petitioners, as is clearly shown, never had any interest in the controversy, but were acting in the interest of other parties to enable them to attack the right and power of the board to establish the rates as prayed for by the petitioners, who were simply acting as their tools, and that the petitioners and their attorney have voluntarily and purposely abondoned the contest, because, we presume, they have no interest in it and the parties for whom they acted refuse to put up the funds necessary to prosecute their petition further. That this is true is clearly shown by the testimony of Alfred Haines, who was the attorney for the contestants before the Board of Supervisors and contested the power of the board to act, and who appeared in the court below defending their right and power to do just what he maintained before them they had no power to do, and Victor E. Shaw, who was the attorney for the petitioners before the Board of Supervisors and did not appear, but allowed a default to be taken.

Testimony of Mr. Haines, Record, pp. 85-97;

Testimony of Victor E. Shaw, Record, pp. 97-100;

Stipulation, Record p. 100.

It is directly stipulated that the petition to the Board of Supervisors was prepared by Mr. Haines, who appeared for the contestants before the board and insisted that the board had no right to power to proceed under the petition he had drawn.

And now Mr. Haines appears here for the members of the Board

of Supervisors, alone, to uphold the action he insisted they had no power or jurisdiction to take, and the taxpayers of San Diego county are expected to pay the expense of a litigation that the petitioners have abandoned.

The court below disposed of this question in the opinion by saying:

"The answer to the first point is that each and every person to whom the rates fixed apply—in other words, the public,—is interested in the question, and the representative of this public in the matter is the Board of Supervisors, each member of which was by the complainant made a party defendant to the suit, and all of whom appeared to the bill and interposed a defense in behalf of all parties interested."

And authorities are cited to show that this practice has been uniformly sanctioned and held to be proper.

See Opinion, Record pp. 51, 62;

San Diego Land and Town Co. v. Jasper, 110 Fed Rep. 702, 712.

But this summary disposition of the question does not meet the case. The statement made by the court is founded upon an entire misconstruction of the law under which the Board of Supervisors proceeded in fixing the rates, and the authorities cited do not support the position taken by the court.

The statute authorizes action only by certain persons possessing prescribed qualifications. Without the filing of a petition by such persons, the Board has no more right or jurisdiction to pass upon the rights of the parties than the court below would have had if no pleading had been filed calling upon the court to act. If the petitioners had, after filing their petition, moved before the board to dismiss it, they would undoubtedly have had that right, and the power of the board to proceed further would have been taken away. If so, when the ordinance fixing the rates, which was, in effect, a decree rendered upon their petition, was assailed in the court below, why had they not the right to *confess* the allegations of the bill and *consent* that the ordinance or decree of the board be set aside and vacated? Suppose they, instead of suffering a default, had come into

court and stipulated that the ordinance might be vacated, could there be any doubt of their right to do so? And if they could, why might they not do the same thing by *confessing* the allegations of the bill by failing to answer?

And we submit the statement of the court disposing of this question, and quoted above, contains a mistake of fact. It is not true in any sense that the Board of Supervisors *represented the persons to whom the rates fixed apply.* If so, the judge of the court below acted in the same representative capacity in passing upon the same question, and he must be made a party to this appeal, and could defend it against an effort of the parties represented to confess error and submit to a reversal of the decree appealed from. The board was acting strictly as a court to decide a question presented to it for decision by a petition regularly filed, and upon notice to the party proceeded against. The effect of the position taken by the learned judge would certainly be peculiar. It assumes that when a petition of this kind is filed, the board at once becomes a *party* to the proceeding, and the representative of *one* of the parties to the controversy *against the other;* that from the time it acquires jurisdiction the parties instituting and prosecuting the proceedings have no control over it, and that although *both* parties agree that the rates fixed were erroneously or illegally fixed and desire to have them set aside, they have no power to do so; but the board, *as the representative of the public,that is, the water takers,*—may take charge of the litigation in spite of all of them, and litigate the question to the end. This is certainly an anomalous and most novel construction of a statute of this kind.

But this is not all. Here the persons "to whom the rates fixed apply" and whom the court holds were represented by the board had appeared before the board and protested in writing against the fixing of the rates by it. They have not intervened or otherwise become parties to this suit, or in any way signified their desire to have the rates fixed maintained. We submit that the conclusion reached by the court is erroneous. It is not only erroneous, but the cases

cited by the court in justification of the conclusion reached do not support it. They have no reference to or bearing upon the question presented here. They are cases where the rates ar fixed by statute, or a public body is authorized and required to act, not at the instance and upon the petition of any one authorized to institute proceedings, but on its own motion, and as a public duty prescribed by law. We have examined these cases, and find nothing in any of them to uphold the conclusion of the court below. They are not parallel cases, and no such question as this was decided or even suggested in any of them. A construction of a statute that takes away from a party who institutes a legal proceeding all power to control it, and transfers to some one else the right to carry on the litigation against his will, should find some better support in reason or authority than that contained in this opinion.

II.

THE PASSAGE OF THE ORDINANCE WAS PROCURED BY A DECEPTION PRACTICED ON THE BOARD OF SUPERVISORS.

As we have shown, the petition in this proceeding was filed and prosecuted by parties having no interest, at least no direct interest, in the rates to be fixed. They had the legal right to petition, because such right is given by the statute to "inhabitants who are taxpayers of any county."

Stat. 1885, p. 95, sec. 3.

If, therefore, they had really been acting in their own interest as taxpayers, we could not justly complain. But the evidence shows that while they were ostensibly appearing in good faith as taxpayers, through their own attorneys, they were in fact appearing for and in the interest of other parties who were asserting interests diametrically opposed to the allegations and prayer of their petition, by an attorney paid, not by them, but by such other parties, and under a petition prepared by one of said other parties,

and the attorneys for all of them, the evident purpose being, not to procure the establishment of rates, as expressly required by the statute, but in opposition to its provisions. The object was to have these petitioners, who were put up as decoys, put the law in motion and thus give the protestants, who prepared their petition for them and paid their costs and their attorney's fee, an opportunity to have rates fixed in such way as to relieve them from paying such rates as would return the company any profit. And a large part of the evidence was introduced before the board to show that the Company had vested the protestants with water rights, and had fixed an annual rate of its own that could not be changed or abrogated by the board.

See the testimony of the following witnesses:

C. L. Josselyn, Record p. 476;

A. H. Downs, Record p. 481;

John M. Ballou, Record p. 482;

C. H. Rippey, Record p. 483;

John E. Clouse, Record p. 518;

Henry Gulick, Jr., Record p. 519;

C. H. Stuart, Record p. 523.

It will be seen, also, that Mr. Haines was the active attorney throughout the proceedings, and the case was tried on his theory of the rights of the consumers. It cannot be surprising that, under such circumstances, the Board of Supervisors should have fallen into error. But it is to be wondered at that the board should have so figured out the exact sum necessary to maintain the plant and operate it and pay the company six per cent. interest on its value as to make it necessary to establish the rate at the precise amount claimed by the protestants to have been fixed by contract with the company. The petition was procured to be filed, by the consumers, in order that they might secure just such a result, and their objection was accomplished by deceiving the Board of Supervisors into the belief that the petition was filed in good faith by the parties signing it, when in fact the petitioners had

no interest in the proceeding and were simply allowing their names to be used and the deception to be practiced on both the board and the company. And the actual condition of things, and the manipulations of the protestants, were not made known until the testimony of the nominal attorney for the petitioners, and one of the attorneys for the protestants was taken in this suit.

See testimony of Haines and Shaw, Record pp. 85-97, 97-100;
Also stipulation, Record p. 100.

If there were no other reason for setting aside these rates, this should be enough.

In Spring Valley Water Works v. Shottler, 110 U. S. 347, 354, this court said:

"Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound, in morals and in law, to exercise an honest judgment as to all matters submitted for their judicial determination."

That there should be the same degree of fairness in this as in other judicial proceedings has been held by the Supreme Court of the State.

San Diego Water Co. v. San Diego, 118 Cal. 556, 574-576.

The same degree of fairness on the part of the litigating parties and their counsel should be required as in a case in court. And surely it is not a fair presentation of a subject matter of litigation to a court for one party, who does not want the relief prayed for, and who professes to contest the right and jurisdiction of the court to give such relief, to procure another party, having no interest in the controversy, to file a petition asking such relief and pay his costs and furnish him an attorney, and then appear in court as a contestant of a petition thus procured to be filed, and leave the court and the opposing party to believe that the petitioners were acting in support of their own claim, and their own interests, and that the contest between the two was, as it appeared to be, a bona fide contest.

In this connection, the discussion that took place at the open-

ing of the proceedings before the board, intended to show that the petitioners and protestants were antagonizing each other, and acting independently, will be interesting reading, together with the subsequent testimony of Mr. Haines and Mr. Shaw above referred to, showing the amicable understanding between them.

III.

THE RATES ARE UNREASONABLE AND UNJUST AND NOT FIXED UPON THE PROPER BASIS.

The opinion of the court below is quite long, but most of it is an effort to vindicate a previous decision of the court in another case against a reversal of it by the Circuit Court of Appeals, and has no relation to, or bearing upon, the questions presented in this case. The question here, on the merits, is whether the rates fixed and established by the Board of Supervisors are reasonable or unreasonable. The learned judge remarks in the beginning:

"While I would not hesitate to annul any ordinance that fixes rates which in effect clearly operate to take one's property without just compensation, contrary to the provisions of the constitution of the United States, the court must not lose sight of the fact that the question is primarily one for the determination of the legislature, or of some public agency designated by it in the present instance, the Board of Supervisors of San Diego County."

The basis of fixing rates is also declared to be *"a fair return upon the reasonable value of the property at the time of its being used for the public"*

This declaration of a willingness to set aside unjust rates and statement of a fair basis for such rates, gave promise of a just and reasonable conclusion in the premises. But the outcome was disappointing. The court seems to have given but little attention to the provisions of the statute bearing upon the amount of revenue to be provided by the rates and to the evidence bearing upon this most important question. The question is treated as if the statute did not provide, as it does, that rates must be so fixed as to return not less than six nor more than eighteen per cent. on the value

of the property. Not only so, but the court, mistaking the evidence entirely, justifies the low valuation by taking the fact not existing at the time the rates were fixed, of a shortage of water of the company, that, as the court assumes, rendered its property less valuable. It is said:

"The evidence before the court shows that at the time the rates in question were fixed the company's supply of water had, by reason of the then prevailing drought in Southern California, very largely decreased, and soon thereafter entirely ceased, so that, while the cost of the system undoubtedly remained the same, it cannot, I think, be justly held that its reasonable value, for the time being, at least, was not largely decreased; for, however much a water plant may have cost, its chief value disappears with the disappearance of the water for the transmission and sale of which it was constructed. Upon the return of the normal rainfall, the value of this property, like that of many other properties which have been injuriously affected in value by the unusual and severe droughts that have recently prevailed in this section of the country, will undoubtedly largely increase, which conditions should, and doubtless will, have due consideration when water rates are again required to be fixed."

The evidence before the Board of Supervisors was introduced in the court below, and appears in the record on this appeal.

Record pp. 264-587.

It shows no such condition as that stated by the court below and made the basis of its decision, and no claim was made before the Board of Supervisors that the plant was less valuable because of a shortage of water. There was a less rainfall in the winter before the fixing of the rates than the average, but there was, as the evidence showed, no apprehension felt or suggested regarding it.

Record p. 538.

As a matter of fact, instead of contending that there was too little water, it was insisted and attempted to be shown that the company had been derelict in its duty in not providing greater facilities for storing the water that went to waste. This will appear fully from the examination by the petitioners of Mr. Savage, the appellant's engineer.

Record pp. 429-436.

There was evidence of a shortage of water, but it was evidence taken in the Circuit Court and not before the Board of Supervisors, and related to a time subsequent to the fixing of the rates complained of.

The ordinance fixing the rates was adopted October 16, 1897, and took effect November 16, 1897, after its publication.

Record pp. 9, 10.

The evidence in which the showing of a shortage of water appeared was not commenced to be taken until December, 1898, more than a year after the rates were fixed, and related, not to the quantity of water in the company's system at the time the rates were fixed, but the following irrigation season.

Record p. 68.

A short extract from the testimony of Mr. Savage will establish what we claim as to the time to which this evidence relates:

"Q. What has been the experience of the company for this last irrigating season, with reference to its water supply and the ability of the system to serve the consumers?

A. Heretofore the drainage basin has always yielded us some water for storage purposes, and also the rainfall of the winter has left the soil in a somewhat saturated condition. This past winter not only it didn't afford us any water for additional storage, but the ground was thoroughly dry at the beginning of the season, demonstrating that the duty of the system was less than it had been estimated to be from the observations of the preceding years through which it had been operated.

Q. What has been the extent of the ability of the system to supply water during the present season, or the last season? The last irrigating season?

A. We have been unable to supply the quantity of water that the orchards reasonably required.

Q. About what proportion of the full supply that you had formerly furnished have you been able to furnish this year?

A. I have not any figures at hand to show accurately; but in round numbers probably about one-third the quantity of water has been delivered this year that has been delivered in past years per acre.

Q. What is the condition of the reservoir at the present time as to its supply of water?

A. The reservoir is substantially empty.

Q. You say 'substantially.' Are you able to supply any water for irrigation at the present time?

A. It is doubtful if there is any water running in the pipe line from the reservoir at the present time.

Q. When was the supply entirely exhausted?

A. *The supply was exhausted the 9th day of this December."*

Record p. 106.

This shows that the supply was exhausted in December, 1898, more than a year after the rates were fixed, and by reason of the dry winter of 1897-1898, *after* the rates were fixed.

So the court below not only mistook the evidence, but it undertook to justify the unjustifiable rates fixed by the Board of Supervisors by bringing into the case an element not taken into account by the board, and which neither the board nor the court had any right to consider. It shows the use by the court of an improper item of evidence to uphold rates manifestly unjust and unreasonable. And the injustice of it is the more apparent when it appears from the evidence that while the appellant was laboring under these unjust rates, and losing money every day, by reason of them, under ordinary circumstances, it was overtaken by the most disastrous and continuous drought ever known in Southern California, and was compelled to install and operate pumping plants, at greater expense, to make good, as far as it was able, this shortage of its water supply, for which it is given no credit by the court. The fact is not even mentioned in the opinion. It is clearly shown by the evidence that the company resorted to extraordinary means to increase the water supply, although under no legal obligation to do so. It asked nothing more of the consumers than an agreement from them to pay a rate sufficient to meet the actual expense of pumping and supplying the water, without any profit to the company. To this the consumers responded, but still the company lost money in a large sum in the effort to supply the water.

See the testimony of Mr. Savage, Record pp. 246-252.

So, instead of considering this effort on the part of the company to supply the needed water through its system of pipes, the pumps taking the place of the reservoir, or stored water, the court

treats the case as if, by the failure of the supply of stored water, the whole system was rendered practically worthless, because there was no water to be carried through the system. A comparison of the evidence in the record, and the opinion of the court, will show a want of attention to the material facts in the case, by which alone the conclusion arrived at was possible. The court not only overlooked or ignored the material facts,—material from its point of view,—of the substituted supply of water, but the fact that this condition of things occurred long after the rates were fixed by the board was also overlooked, and the erroneous supposition that it had something to do with the fixing of the rates and the then value of the plant of the appellant made the foundation of the court's conclusion that the value of the plant fixed by the board was justified by the facts. If the court was right in its position that the value of the plant must be determined by its present ability to supply water, all of the evidence found in the record going to prove the insufficiency of the water supply *after* the rates were fixed was immaterial, and should have received no consideration by the court. If this had been an action at law, all of this evidence would have been excluded as immaterial and irrelevant. It is expected of a court of equity that it will properly discriminate between material and immaterial evidence and consider only that which is material to the issue. In this case, that was not done. This evidence of after conditions was dragged into the case for the purpose, and with the hope, that it would tend to prejudice the mind of the court against the justice of the appellant's contention. We had a right to expect, and did expect, that the learned judge would treat this evidence as it deserved to be treated, and give it no weight. Instead of that, the court has singled out this evidence and made it the foundation of his conclusion that the rates were not so unreasonnable as to warrant interference by the court.

But let us look into this question a little further. Suppose the court below had been right, and that at the time the rates were fixed by the board a drought had prevailed, and the water supply

had temporarily failed. Can it be possible that the rates to be fixed must depend upon the condition of the weather at the precise time the rates are fixed? If so, as the consumers are allowed to call for the fixing of the rates at any time, and if they act with discretion, and select a *dry* year each time, they are reasonably sure of low rates, continuously, as dry years are not infrequent in Southern California. It is a well known fact, so well known that this court will take judicial notice of it, that the rainfall has not been sufficient for the past five years to fill the storage reservior of a single one of the large water companies supplying water for irrigation in Southern California. If any such basis of value as that assumed by the court below were taken in fixing the rates of any of these companies, their plants must be taken as practically worthless, although in almost every instance they have supplemented their supply by resorting to pumps, and thus distributed a supply, not always adequate, but sufficient to protect the trees irrigated and save the crops.

According to this mode of arriving at values, if the rates are fixed one day, on the basis of a present inadequate supply, and the drought is broken the next day, and the reservoirs filled, the rates must stand at least for a year under the provision of the statute. This is an element of value never heard of before in this class of cases. It was evolved by the learned judge of the court below out of mistaken and immaterial evidence that should have received no consideration at the hands of the court. The most that can justly be said of the inability of a water company to furnish a full supply of water if a drought occurs, is that this may be taken into account with other circumstances in arriving at its actual value *at all times*, and not at the precise time the drought prevails. We submit that the view taken by the court below is unreasonable and unjust, and that a decision resting upon such reasoning for its support should be reversed.

If we eliminate this element, first brought into the case by the court below, and consider the case upon the basis of value taken

by the Board of Supervisors, the outcome must be the same. No disinterested mind can come to the conclusion that the value of the plant found by the board was its *real* or *actual* value, or that it approximated its value. We submit that the rates as fixed by the Board of Supervisors are unreasonable and unjust, and not fixed upon the proper basis:

(a) *Because the assessed valuation for taxation and the price at which the property was sold at foreclosure sale, and not the actual value of the property, was taken as the basis of establishing the rates.*

The statute under which the rates were established provides as follows:

"Said Boards of Supervisors, in fixing such rates, shall, as near as may be, *so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water* of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repairs and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said Boards of Supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable, and just, both as to such persons, companies, associations, and corporations, and to said inhabitants."

Stat. 1885, p. 97, sec. 5.

This statute clearly requires that nothing less than the actual value of the plant shall be taken as the basis of establishing the rates and that not less than six per cent. on such value shall be returned by such rates.

In this case the undisputed evidence shows that the value and basis of fixing the rates was reached by taking the assessed valu-

ation for taxation and the proportionate amount of the cost of the water system at the foreclosure sale, which included, in a lump sum, not only the water system, but all other property and securities of the company, consisting of thousands of acres of land, a railroad, and various other properties.

As to the first element of value, the assessed valuation, the evidence shows how absurd it is that it should even be considered for the purpose, much less taken as a criterion of the actual value. The testimony of the witness, Copeland, the officer making the assessment, shows how the valuation for taxation was reached. He says:

"Q. What changes have been made in the valuation since you first made the assessment, Mr. Copeland? I am speaking now with reference to the dam and the distributing system.

A. There was a change in 1896 from the distributing system at $68,000 to $80,000.

Q. That is the only change that has been made in all those years?

A. That is the only change.

Q. How many years have you assessed it?

A. Six years.

Q. It is your opinion that it has remained at precisely the same value all these years, has it?

A. I think so, except 1896 and 1897.

Q. That was by reason of some addition being made to it?

A. That was by reason of addition in the pipe line.

Q. What was the addition that you assessed at that time, pipe line No. 2?

A. Pipe line No. 2.

Q. You assessed that at $12,000, did you?

A. Twelve thousand dollars.

Q. Did you know how much it cost?

A. No, not exactly; I have an idea what it cost.

Q. What was your idea of what it cost?

A. It cost in the neighborhood of sixty thousand dollars.

Q. And you assessed it at $12,000?

A. Yes sir.

Q. How did you get at that value?

A. I asked Mr. Burt and he told me to assess it proportionately as the other had been assessed.

Q. Then you did not attempt to get at the actual value of that new pipe line at all, did you?

A. No, I took it under Mr. Burt's instructions to assess it proportionately to the cost of the whole.

Q. Then you did not exercise your own judgment as to the value?

A. No sir.

Q. Why do you tell the board that that is your judgment as to the value?

A. Yes sir.

Q. That is your judgment, is it?

A. Yes sir.

Q. You got your information as to your judgment from Mr. Burt as to what value to put upon it?

A. Yes sir.

Q. What makes you think that pipe line that cost $60,000 is not worth more than $12,000?

A. Because I do not think it would sell for more than that.

Q. That is the way you put the value on it, at what it could be sold for?

A. That is the way I put the value on everything.

Q. Is that the way you put the value on that?

A. I put the value on that as I told you under Mr. Burt's instruction.

Q. Then you did not put it on the actual value of it, but on what somebody else told you to assess it, is that the idea?

A. That is the idea.

Q. How do you know what the property could be sold for?

Have you known of any property of that kind being sold in that neighborhood?

A. No.

Q. How did you arrive at your conclusion, then, as to what it could be sold for?

A. Simply my judgment in the case.

Q. Upon what is your judgment based?

A. Because I do not think such property is very salable.

Q. Have you ever known of any property similar to that being sold in the market at all, Mr. Copeland?

A. No sir.

Q. Or know what it could be sold for?

A. No sir.

Q. Now did you know about what the dam cost?

A. Yes sir.

Q. How much?

A. I know what they said it cost, I do not know of my own knowledge what it cost.

Q. Well, about how much?

A. Well, I do not know now that I can tell you just what it did cost.

Q. About $237,000, wasn't it, in that neighborhood?

A. My recollection is somewhere in the neighborhood of $300,000.

Q. You had that information when you made this assessment, didn't you?

A. I never placed any valuation on the dam except by the instruction of my employer.

Q. Now what property did you assess on your own judgment?

A. All the lands and all the improvements on them.

Q. Well, I am speaking about this water plant. Did you place any valuation upon it on your own judgment?

A. No sir.

Q. You did not know what its value was when you assessed it, did you?

A. I do not think anybody can know exactly what the value is.

Q. You did not even exercise your own judgment, but simply put it down at what somebody told you to put it down, didn't you?

A. Certainly.

Q. Is that the only knowledge you had upon which to base your valuation?

A. The only knowledge I had was my instructions."

Record, pp. 487, 491.

The cross-examination of the witness, showing how he arrived at the values, is especially called to the attention of the court.

The undisputed evidence is that the actual cost of the system to the company constructing it was $1,026,022.79.

See statement of cost of plant, Record p. 543.

The evidence as to its cost is undisputed. The court below took this as its cost.

The latest decision of this court is to the effect that the actual value of the plant at the time of esablishing the rates must be taken.

San Diego Land and Town Co., v. National City, 174 U. S. 739.

In that case the court said:

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in consructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. *Undoubtedly all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company, and to the public.* The basis of calculation suggested by the appellant is, however, defective in not requiring the *real* value of the property and the *fair value in themselves of the services rendered* to be taken into consideration. *What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the prop-*

erty at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

It follows that the *real* value of the plant and the fair value of the service to the consumer are to be taken as the basis of fixing the rates, and that under the statute the real value of the service to the consumer is "not less than six per cent." on the real value of the plant. It is not the assessed value of the plant or the price at which it might have been sold at a previous time that controls.

It certainly is not necessary to take up the time of the court in an effort to show that the value fixed upon the property for taxation cannot be taken as establishing its actual or real value. That such assessments do not represent the real value of the property is notorious. That the assessment made in this particular instance was purely arbitrary and had no reference to the real value of the property is perfectly apparent. That the price at which the property was sold cannot properly be taken as representing or fixing its real value is equally apparent. The evidence shows that the company was largely in debt. That a part of the indebtedness was secured by the issuance of the bonds of the company secured by a trust deed on all of its property. The revenues and income of the company from all sources was insufficient to meet its fixed charges, including the interest on its indebtedness, a receiver had been applied for and appointed by the court, and receiver's certificates had been issued in a very large amount to pay the operating expenses of the company. In this emergency the stockholders of the company undertook to assess themselves ten dollars a share on the stock to pay off its debts. Over eighty per cent. of the stock met this call, and, if the remaining stockholders had responded, no sale of the property would have been necessary, or would have taken place. But they did not, and, as a consequence,

the whole property had to be sold and a new company organized consisting of all the stockholders that had met the call for an assessment to pay the old company's debts, to bid in and take over the property, to protect themselves. Every stockholder that had responded to the assessment was thus placed on an equal footing in the new company with every other stockholder. It was only the stockholder that refused to meet the moderate assessment imposed upon his stock that lost his rights in the property by the foreclosure and sale. It was the same result that would have followed if an assessment had been regularly levied against his stock and the stock sold for its non-payment. The manner in which this assessment was made and voluntarily met by a very large proportion of the stockholders is clearly shown by the testimony of Mr. Lanning, the receiver appointed by the court in Mandell v. San Diego Land and Town Company, the treasurer of the old San Diego Land and Town Company, and the vice-president and treasurer of the new company.

See Mr. Lanning's testimony, Record pp. 158-163.

He says, at page 163:

"Q. You say the property was bought in for the benefit of the stockholders. In whose name was it bought in?

A. The actual bidders for the property were Messrs. B. P. Cheney and Walter L. Frost, as I recall it.

Q. Did they subsequently convey the property to the new corporation that was organized?

A. Under the form of sale the property was conveyed, under the order of Messrs. Cheney and Frost, directly to the San Diego Land and Town Company of Maine.

Q. They bought it in, as I understand, and then a petition was filed requesting that the deed be made directly to the new company—is that it?

A. Directly; so that the deed passed from the receiver of the old company directly to the new company.

Q. At the time the property was sold at the foreclosure sale,

were there any bidders for the property except the persons who were representing the stockholders of the company?

A. There were no other bidders.

Q. Then, if I understand you, this whole proceeding by which the title of the property was transferred to the present company was for the purpose of clearing off the indebtedness of the company with the money of the stockholders themselves, and the sale and purchase were made for the purpose of vesting the title in the stockholders who had put up their money?

A. That is substantially what was done.

Q. You have mentioned the fact that one of the principal stockholders of the company advanced a large sum of money to finance the company. What stockholder was that?

A. That was Mr. B. P. Cheney, the father of the present president of the company.

Q. You may state for what purpose or purposes the money that was advanced by Mr. Cheney was used, whether in the water department of the company or elsewhere?

A. Of the floating debt of the company at the time the receiver was appointed a large part was incurred for money advanced to the company and expended by it for certain work of construction and repair on the water system, necessary work, and in addition to the amounts advanced in that way a large amount had already been advanced in 1894, or rather had reached the company by sale of its seven per cent. debenture bonds, to be used also for the purposes of the water system."

Record, p. 163.

The very fact that the company was unable to obtain reasonable rates for the water it was bound by law to supply was the prime reason for the decrease in value of its plant if there was such decrease as claimed, and the cause of its insolvency, the appointment of a receiver, and forced sale of its property. It was also a most cogent reason why there were no bidders at the sale except the stockholders who had put up their money to save the com-

pany and were compelled to buy in the property to save themselves the money they had advanced for its protection.

Therefore, to hold that the purchase price paid under such circumstances, must fix the value of the plant, for the purpose of fixing rates, not only violates the express terms of the statute, but is entirely unjust and ruinous to the company.

The case of Dow v. Beidelman, 125 U. S. 680, is the only one that gives countenance to the contention that the selling price is proper to be taken as the basis of fixing rates that has come to our notice. That case has been referred to as supporting this view. We do not so understand it, and certainly if it can be so construed, as applied to railroad companies, and the circumstances there presented, it could not be regarded as applicable to this case, where the basis of actual value is made by the express terms of the statute, as construed by the courts, the basis of fixing the rates.

In that case the court does not hold that the price at which the property was purchased shall be taken as fixing the value of the property. It was argued for the company that the rate of three cents per mile would pay less than 1½ per cent. on the original cost of the road, and only a little more than 2 per cent. on the amount of its bonded debt. In response to this the court said:

"But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as organized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equaled the original cost of the road or the amount of the outstanding bonded debt, without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would, under any circumstances, have the power of determining that the rate of three cents a mile, fixed by the legislature, is unreasonable."

This was nothing more than to say that no proof was made of any basis upon which the rates could be held to be unreasonable, either by proof of the cost of the road, the cost of the bonds, or the price paid for the road by the reorganization corporation, or its trustees. The question as to what should be taken as the basis

of fixing the rates was not the point raised or decided. And, as we have said, the statute must control in this suit, and the later decisions of this court, including that of San Diego Land and Town Company v. National City, above cited, are clearly to the effect that the *actual* value at the time the plant is in use must control.

(b) *The rates were not fixed on a basis of what was the reasonable value of the use of the system and water to the consumers.*

This court has held that the reasonable value of the use of the water and plant of the company, or the services rendered by it in supplying the water to consumers, shall be taken into account in arriving at just rates.

Smyth v. Ames, 169 U. S. 466, 524.

San Diego Land and Town Co. v. National City, 174 U. S. 739, 757.

It may be difficult to arrive at what the value of such use is to the consumers. One man, by proper care of his orchard and conservation of the water, may so use the water supplied as to make it of great value to him, while another man, having the same use, may, by mismanagement of his land and the water, render it of comparatively little benefit. And the means of arriving at the value of the use to the consumer is certainly not adequate in all cases. But the facts here show beyond any controversy that the land supplied by this system is, without irrigation, semi-arid and practically of no value for agricultural purposes, and that with water it is wonderfully productive; that without water the land was worth from twenty-five to fifty dollars an acre, and with water its value is from two hundred and fifty to three hundred dollars an acre; that the system is one of the best in the country, supplying water in closed pipes, under constant pressure; that the actual cost of the system to the company was $1,026,022.79; that the most of the land irrigated is planted to citrus trees; that they are planted seventy-six trees to the acre; that the ordinance rate of

$3.50 per acre, per annum, would amount to five cents a tree per annum, counting but seventy trees to the acre.

In the hearing before the Board of Supervisors no effort was made to prove the value of the use of the water and of the plant to the consumers, nor did the consumers make any effort to show what such services were worth, after the decision of the National City case, except indirectly, by showing the damage that resulted from a temporary withdrawal of the service on account of the extraordinary drouth that prevailed for two years.

Now, as this court has held that the value of the service to the consumer should be taken into account in arriving at what are just rates, let us see what the evidence establishes as to the value of the use of the water to them for irrigating purposes.

It is proper to say, in the beginning, that there has been no controversy between the company and its consumers, at any time, as to the reasonableness of the domestic rates, and that it was agreed, at the hearing before the Supervisors, which resulted in the ordinance in question here, that the domestic rates should not be changed.

Therefore, the sole question was, and is, whether the irrigation rate established by this ordinance is reasonable and just or not.

The rate fixed by the ordinance is $3.50 an acre per annum. Therefore, the owner of a ten-acre tract pays only $35.00 a year for his water, furnished under constant pressure, to be taken when he pleases. The evidence is that the irrigated lands under the system are planted to trees, 76 to the acre; and counting only 70 trees to the acre, this would be *five cents a tree* annually. And the rate for 350,000 gallons per acre, the amount agreed by the company to be furnished and found to be amply sufficient, is *one cent a thousand gallons.*

Mr. Boal says in his testimony:

"Q. You are familiar, I believe, with the manner of planting trees in Chula Vista, under the system of the land and town company?

A. I am.

Q. How many trees are planted to the acre?

A. As a rule they are set 24 feet apart each way, which would make at the rate of 76 and a fraction per acre. This rule is sometimes varied from, but not to any great extent.

Q. Calculating the number at 70 to the acre, what would be the cost per tree for irrigating at the rate fixed by the Board of Supervisors, $3.50 an acre per annum?

A. Assuming that they used the 350,000 gallons per acre, each tree would receive 5,000 gallons, and at one cent per thousand gallons the cost would be five cents per tree; and at two cents per thousand gallons, the cost would be ten cents per tree.

Q. One cent per thousand gallons is the amount fixed by the ordinance in question in this case, is it not?

A. It is.

Q. Then under the ordinance the cost per tree annually for irrigation would be five cents?

A. It would."

Record p. 151.

About 70 per cent. of the trees are lemon trees. Most of the trees under the system are young, very few exceeding eight years at the time the ordinance was adopted. One of the consumers testifies that at five years of age a lemon tree will produce a box and a half of fruit, and that at ten or twelve years it will yield an average of fifteen boxes; that the price of lemons at the time the witness testified was three cents a pound, and that in a field box there were from forty-five to fifty pounds of lemons.

Mr. Dale, one of the water consumers, says:

"Q. Mr. Dale, you are a practical horticulturist?

A. Only a novice at it.

Q. How long have you been at it?

A. Five years.

Q. That has been your business during those five years?

A. Practically—yes.

Q. What number of boxes of lemons may be reasonably expected from a full-grown tree?

A. I never saw a full-grown tree.

Q. What aged trees would you be able to speak from?

A. From my own orchard, five years old.

Q. What would be the average output in boxes per tree for trees of that age?

A. Mine last year averaged me probably half a box—I guess more than that—three quarters of a box to a box to the tree; this year they will average a box and a half to the tree.

Q. Last year was not an average year, was it?

A. Well, I think it was; I think my orchard was a little above the average.

Q. The amount of lemons will increase from this on up to what age of the tree?

A. I can only answer by hearsay; I don't know from my own knowledge.

Q. What is your information on the subject?

A. I have information that it will average probably fifteen boxes to the tree when the tree is ten or twelve years old. I have had estimates a great deal higher, and estimates lower.

Q. I want to get a fair average. Do you think fifteen boxes would be a fair average?

A. For a well taken care of tree I should think it would.

Q. What are lemons selling for this year?

A. I have heard prices all the way from one cent a pound to three.

Q. Just at this moment what is the price?

A. I don't know.

Q. It is in the neighborhood of three cents a pound, is is not?

A. I presume it is."

Counting fifty pounds to the box, a five year old tree would yield, at a box and a half to the tree, $2.25 worth of fruit to the tree, and a tree ten or twelve years old, at fifteen boxes,

$45.00 worth a tree, while the water to keep the tree alive and make this fruit must, under this ordinance, be supplied for a whole year for *five cents.*

Of course, the $1.50 a box cannot be had every year, but that is a fair average, nor is that amount all profit. But if the business of growing fruit cannot bear the rate of ten cents a tree, or $7.00 an acre, the amount the company has fixed as a reasonable rate, then fruit growers in Chula Vista may as well go out of business.

We have presented the question of the value of the services to the consumer separately, because this court has said that it must be taken as one of the elements in arriving at what are just rates. And we might very safely rest upon this alone. It is absurd to say that the services rendered by this company, and the water it supplies is not reasonably worth more than this ordinance declares it to be worth.

But, if evidence were needed to estab'ish the fact, the defendants have supplied it by proving, with great particularity, the injury and damage resulting to the orchards when the company was unable, on account of the severe and prolonged drought, to supply the needed full supply of water.

See Record, pp. 135, 137, 139, 145, 147, 148.

No evidence that could have been offered could have shown more clearly than this evidence, offered by the defendants themselves, the value of the services of the company, and the use of the water, to the consumers. Without it their orchards would be barren and their trees would eventually die. And yet they ask this court to compel the complainnat to continue this service at a rate that means ruination to the company, and one that is ridiculously low if we consider the value of the services to the consumers alone.

We will have occasion to consider the evidence showing loss to the consumers by reason of the shortage of water, further along, and in another connection.

There is evidence showing the superiority of the services rendered by this company over that of any other company in the State, by reason of the fact that it carried the water, at its own expense, to the lands of each consumer and supplied it there, under pressure, and at all times of the year.

If we look at the means by which the Board of Supervisors arrived at the rates in question, it must convince any reasonable mind, it seems to us, that they are unreasonably low. To begin with, as we have shown, they fix the value of the plant at $350,000. How has this property been reduced to one-third of its original cost?

(c) *Loss to the company by depreciation was not considered by the Board of Supervisors in fixing the rate.*

At the conclusion of the evidence we submitted a request in writing that the board find certain facts, as follows:

"In the Matter of the Petition of M. T. Hall, et al. for the Fixing of Rates to be Charged for Water Furnished by the San Diego Land and Town Company.

To the honorable Board of Supervisors of the County of San Diego, State of California:

The San Diego Land and Town Company respectfully requests: That in the fixing and determination of the rates to be charged by this company for water to be furnished to its consumers, the board find and determine the following matters, to wit:

1. The value of the dam, reservoir, water rights and distributing system, and all other property actually needed by said company, and useful to the appropriation and furnishing of such water.

2. The annual reasonable expenses of the company, including the cost of repairs, management and operating its works.

3. The cost of any extensions, enlargements, or other permanent improvements of the water works of the company, since the original construction of its plant.

4. The amount of depreciation of the plant of the company,

by natural wear from use and the action of the elements, either by way of percentage per annum of such deterioration, or the gross sum thereof for the years since the company commenced to furnish water.

5. The rates for irrigation necessary to be charged, together with the domestic rates, in order to return to the company net annual receipts and profits of not less than six per cent. upon the value of the property as found by the board.

WORKS, WORKS & INGLE,

Attorneys for San Diego Land and Town Company."

Record, p. 540.

All of these, except the depreciation of the plant, are expressly required, by the statute, to be found.

Stat. Cal. 1885, p. 96, sec. 4.

And the statute further provides:

"In fixing said rates within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said Boards of Supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable and just, both to such persons, companies, associations, and corporations and to said inhabitants."

Stat. Cal. 1885, p. 95, sec. 5.

There was no single fact, not expressly required by the statute to be found, more important than this one of depreciation. That it should be considered in arriving at just rates the court below has decided.

San Diego Land and Town Company v. National City, 74 Fed. Rep. 79, 83.

And the conclusion was affirmed by this court in the same case.

San Diego Land and Town Co. v. National City, 174 U. S. 739, 757.

No such finding as was requested was made. The board made what is called a finding as follows:

"FINDINGS.

Office of the Board of Supervisors of the County of San Diego, State of California.

In the Matter of Fixing Water Rates for the San Diego Land and Town Co. of Maine.

This matter coming on regularly to be heard, and the evidence all being presented, the board after a careful consideration of all the testimony regarding the value of the water plant of the San Diego Land and Town Company of Maine, including the amount at which the entire property had recently been sold, to wit: $889,163.33, and the proportionate value of the said plant to the whole of the property sold and the amount at which said plant has been carried upon the assessment-rolls of the county for the past eight years, to wit: $155,000.00. We estimate and determine the value of said plant to be $350,000.00.

We further fix the rate of interest at 6 % per annum, making the sum of $21,000.00 per annum.

We further estimate and determine the amount of the expense necessary to maintain and operate said plant to be $13,442.00. Making the sum total of revenue to be raised for the company $34,442.00 per annum.

We further estimate and determine the capacity of the reservoir to be 3,000,000,000 gallons.

We further estimate and determine that the amount of water used by National City to be about 600,000,000 gallons per annum.

We further estimate the amount of water available for outside irrigation purposes to be 2,400,000,000 gallons, a sufficient quantity to irrigate 6,080 acres of land allowing 350,000 gallons per acre, and we fix an annual rate of $3.50 per acre, making a sum total of $21,280.00 per annum.

We further find that the annual sum the company receives from the sale of water to National City is $13,162.00, which sum taken together with the above estimated amount of outside water rental ($21,280.00) makes a total of $34,442.00—the whole amount required to produce the interest and operating expenses as above set forth."

Record, p. 73.

With respect to the question of depreciation, it is usually claimed that there can be no allowance of an amount to make good the loss to the company by natural depreciation, because such loss is made good by the repayment of moneys expended for repairs.

If it were true that the loss by depreciation were met in the way indicated, the position taken would be unassailable. But it is far from being true. Repairs in the proper sense are the ordinary patching of pipes where leaks occur and the replacemnet of a piece of pipe here and there, as defects are found or breaks occur, and work of a similar kind occurring each year. But while these repairs are going on, the whole plant is slowly but sure'y going to decay, and sooner or later must be replaced. It cannot be maintained that the gradual loss, which must inevitably compel the company to replace its entire plant, is met by the payment for repairs made each year. Entire pipe lines have had to be replaced because the old pipes have gone to decay. If this replacement had been charged up against consumers as *repairs*, they would have been compelled to repay to the company the whole amount thus expended. But it was charged up on the books of the company as new construction, thus adding to the actual amount expended, and upon which a fair interest should be paid by consumers each year. Again, some of the large mains of the company will soon have to be replaced at large expense. If this sum is charged against consumers as *repairs*, this whole expenditure must be repaid the following year after the expenditure is made. This is necessarily so under the position taken that this gradual wearing away and eating out of the pipe system is to be made good by paying for all replacements as repairs. It must be seen at once by any one who stops to think of the consequences, that this would be unjust to consumers. According to the evidence of engineers, this whole pipe system will have to be replaced in a few years. And, according to this contention, the whole expense of replacing the old with new must be repaid by the consumers. Under such a rule, if established by this court, consumers receiving water from a new system would pay but little, although the service to them would be as good, even better, than when the system begins to fall into decay, and later consumers will be compelled to pay for the replacement of the whole system. No one can fail to see the injustice of such a

rule. If it were adopted and enforced, the company would have no reason to complain, as it must eventually have all of its money invested in the plant returned to it in rates, and the consumers would still have to pay a return on the *value* of the new plant, according to their contention, although actually constructed with their own money. This would, it seems to us, be utterly unreasonable and unjust to the consumers.

On the other hand, if nothing is allowed to the company but the repayment of the amounts expended from year to year for ordinary repairs, and without taking into account this continuous depreciation, the company must eventually be brought to ruin, because it must in time replace its whole plant, and no sinking fund has been provided or other provision made for such purpose.

We submit that the only proper and reasonable way of adjusting the loss by depreciation, between the company and its consumers, is to allow each year a reasonable percentage to meet this loss and provide for the replacement and renewal of the plant, new for old.

In this case, the evidence, which is undisputed, shows that the soil in which the complainant's pipes are situated is peculiarly destructive to the pipes, and that the loss to the company from the natural depreciation will amount to six per cent. per annum.

Testimony of Mr. Savage, Record, pp. 113, 114.

Testimony of Mr. Boal, Record, pp. 112, 113.

The Board of Supervisors did not, according to one of the members of the Board of Supervisors, take the matter of depreciation into account at all. Their alleged findings that were never filed show that they made no allowance for depreciation.

The court below disposed of this question of depreciation in its opinion as follows:

"It is insisted on the part of the complainant that the Board of Supervisors made no allowance for the deterioration of the plant, and that the evidence plainly shows that the soil in which the pipes of this company are laid is of such a nature that the pipes rust and otherwise deteriorate much more rapidly than similar pipes in other soils, and require to be relaid in from 10

to 20 years. The evidence undoubtedly so shows, and that fact should be given due consideration in fixing rates and in determining their reasonableness; but it is not just, I think, to charge all of the consequences of that unfortunate state of affairs to the consumers. To some extent, at least, it goes to lessen the value of the plant itself, and this fact must be given consideration by the court in deciding upon the effect of the action of the Board of Supervisors; for it must be remembered that it is the result of its action as embodied in the ordinance that is the subject for the determination of the court, not the processes by which it reached its conclusion."

The court concludes that depreciation should be taken into account, but insists that it is not just that the whole depreciation should be allowed to the company. But the trouble is that in this instance the Board of Supervisors allowed a bare six per cent. upon the value of the plant of the company, based upon an unjustly low valuation, and allowed nothing whatever for depreciation. The undisputed evidence shows that the depreciation of this plant in the soil in which it was located amounted to six per cent. of its value per annum. That was precisely the amount of revenue returned to the company by the rates as fixed by the Board of Supervisors. Consequently, the company received barely enough to make good this depreciation and keep its plant in condition. It is nothing short of remarkable that the court below should, after expressing its view of the law to the effect that the company was entitled to have the question of depreciation considered, uphold the rates fixed by the Board of Supervisors, which could do nothing more than make good this depreciation and return the company no profit whatever. There is an inconsistency here that can not be argued away.

(d) *Taking into account all the elements proper to be considered, the rates are unreasonable and unjust.*

We have attempted to point out the different elements that should enter into consideration of the question of rates, and that the rates in this case were established without considering those elements. It may be well to consider, briefly, the question as a whole, and the means actually resorted to by the Board of

Supervisors in fixing the rates in question here, as showing not only that the board acted upon a wholly erroneous view of their duties, but that their own findings, so-called, and their own figures show conclusively that the rates established by the board are unreasonable and unjust, and amount to the taking of the property of the complainant without just compensation.

If we look at the means by which the Board of Supervisors arrived at the rates in question, it must convince any reasonable mind, it seems to us, that they are unreasonably low. To begin with, as we have shown, they fix the value of the plant at $350,000. How has this property been reduced to one-third of its original cost in ten years? Is it by depriciation from wear and tear? They say not, because the depreciation is made good by the annual repairs. The evidence of the engineers is that it could have been replaced probably for two-thirds of its original cost, or $684,015.19. The service of the company to the consumers is just as valuable now as it was when the works were new. And the showing of the board is clearly to the effect that it did not find that the real value of the system had decreased to $350,000 as we have shown. On the contrary, they so found on the basis of the whole property of the company having been sold at forced sale for $900,000, and that the water system had been assessed for taxation at about $250,000. So the basis of their whole calculation, in arriving at the rates, is both erroneous and unjust. They find the operating expenses to have been $13,442.00, which is a reduction of $467.32 from the amount shown by the company as the actual expenses.

They find that the system will supply 6080 acres, and calculate that at the rate of $3.50 an acre *on the whole number of acres*, and the amount realized for domestic purposes and irrigation in National City, amounting to $13,162.00, would realize to the company $34,442.00, making the operating expenses and 6 per cent. on $350,000. In this way, and without allowing anything

for depreciation, they arrive at the statutory measure of 6 per cent. as the rate to be allowed.

But, aside from the unreasonably low valuation fixed upon the property, the company has never supplied water to more than 4,600 acres.

Record, pp. 354, 448.

This would entail a loss upon the company of $3.50 an acre on the difference between 4,600 acres and 6,080 acres found by the board, or $5,180 a year, or almost one-fourth of the 6 per cent. on the $350,000 valuation allowed by the board. There might be some reason for holding that the company could not, in reason, be allowed to collect the full compensation allowed by the statute where it is only furnishing part of the land its system will supply if the rate to be allowed would be unreasonable or oppressive to the consumer. But the statute makes allowances for just such a contingency by giving the board the right to fix the compensation anywhere from six to eighteen per cent. And when we consider the nature of the risks taken by a company of this kind, and the heavy loss it is constantly sustaining, by depreciation and otherwise, no one would contend, looking at it from the standpoint of the company's interests, that six per cent. would be a reasonable return to it. But we think that we have shown that, looking at it from the standpoint of the consumer, and the value of the services to him, the rates allowed in this case are ridiculously low. And for that reason the charging up against the company of $3.50 an acre on nearly two thousand acres that it does not supply, in order to make the rate required by the statute, is unjust. It is an admitted fact that the company has never received anything like the $34,442.00 figured by the Board of Supervisors, and it has, all along, been collecting this same rate of $3.50 an acre for irrigation, and the same domestic rate which is now changed by the ordinance here in controversy.

It is alleged in the bill that not more than $25,000 can be realized from the rates.

Record p. 3.

And the answer alleges that the company can realize $30,000 from the rates.

Record p. 28.

But the evidence is that the highest amount ever received by the company from all sources was $29,502.16 in 1896. In 1897, the amount fell off to $27,145.18.

See tabulated statement, "Water Rents Received," Record p. 130.

And it must be remembered that this amount is made up in part of amounts received for water rights none of which have since been sold or can be under the decision of the court.

So the amount of $25,000, alleged in the bill, is undoubtedly the full amount that can be realized from the rates fixed by the ordinance. Not only so, but the company has been compelled to refund, of the amount received by it for water rights, the sum of $1,772.06.

The actual receipts and expenses of the company, since it commenced business, as well as the actual cost of its system, will be found in tabulated statements introduced in evidence.

Record pp. 542, 543.

The only attempt made to disprove, or discredit, these statements, relates to the expenses of the company, particularly the cost of the Boston office. And this is done, in part, by attempting to show, on cross-examination, that some of the items are not proper charges, and, in part, by producing reports made by the president of the company in the annual reports made to stockholders showing the operating expenses to be less than our evidence shows them to be. But, the Board of Supervisors found the expenses as reported by the company less only $467.32.

The sworn testimony of Mr. Boal, the general manager, and Mr. Lanning, the treasurer, is that the expenses, as reported, are correct, and that the reports of the Boston office relied upon as showing a net profit to the company, were erroneous in that they omitted certain proper items of expense that should have been exhibited, and which would have shown a loss instead of a profit to the company.

Testimony of Mr. Boal, Record p. 353.

And it will be borne in mind that the verified returns of the company, required by law to be made, and the sworn testimony of the officers of the company, as well as the finding of the Board of Supervisors are all against this general annual report of the Boston office showing merely an excess of receipts over expenses.

The evidence shows that only a part of the expenses have been charged to the water department of the company. And an examination of the evidence given on this subject will, we are satisfied, convince the court that the water department has been charged with much less than its legitimate proportion of the expenses. This has been done in such a way as to make it perfectly evident that the expenses and cost of operation have been undercharged, instead of overcharged. This is particularly true of the salaries of the general manager and attorneys, whose time and services have been taken up largely by the troubles and complications necessarily incidental to the water department, and all of which would have been necessary if the water department had been operated alone or by a separate and distinct company.

As to the division of the expenses between the water and land department of the company,

See testimony of Mr. Boal, Record p. 328.

As to the details of the expenses and cost of operation, we will not undertake to enter at this time. If any criticisms are made as to any of them by opposing counsel, we will reserve our right to respond to them in our reply brief.

EFFECT OF EVIDENCE OF FAILURE TO SUPPLY FULL QUANTITY OF WATER, AND THAT WATER WAS OF BAD QUAQLITY.

There was evidence offered by the defendants in this suit to the effect that the water supplied by the company, since the adoption of the ordinance in question, has been of bad quality, and that the full supply has not been furnished. What has occurred since the ordinance was adopted could not have affected the decision of the Board of Supervisors in establishing the rates, nor is it pretended

that it did. Neither is any such defense set up in the answer in this action, and it was all objected to by us.

Nevertheless, we invite the attention of the court to this evidence. The court will take judicial notice of the fact that the last three seasons have been years of extreme drouth, the difficulties of supplying water by the complainant have been of the most serious character, and the work of developing additional water, by pumping, has been exceedingly expensive. The witnesses agree that the bad quality of the water was the result of the depletion of the supply in the reservoir, which resulted without any fault on the part of the company.

The want of rainfall made it necessary that some extraordinary efforts should be made to add to the water supply. This resulted in an amicable agreement between the consumers and the company obligating the company to put in pumping plants and pump water to the extra expenses of which the consumers agreed to contribute. An apportionment of the water in such way as to make the limited supply sufficient to protect the orchards of all consumers was also agreed upon. It was only by this joint and combined effort of consumers and the company that the orchards under the system were saved from destruction, as no one will deny. Under the agreement, we submit, the company has done its full duty, and, as the sequel has demonstrated, it has, as usual, made this extraordinary effort and produced the additional water at a loss to it.

Testimony of Mr. Savage, Record pp. 246, 252.

We submit that instead of this evidence tending to show that the rates of the company should be lower, it proves conclusively the extreme difficulty of supplying the water, the hazards of an investment of this kind, and the fidelity of the company to its trusts and obligations under the most trying circumstances.

ERRONEOUS VIEWS OF THE COURT BELOW.

Two opinions were delivered in this case by the learned judge of the court below, one upon exceptions and demurrer to the bill, and the other upon the final hearing. They seem to us to be entirely

inconsistent in their views of the facts alleged and proved, and the conclusions reached by the court. In the first of these opinions, it is said by the court:

"The bill alleges, as has been seen, that the defendant Board of Supervisors did not find or determine the value of the complainant's property actually used and useful in the appropriation and furnishing of the water or the annual reasonable expenses of the complainant, including the cost of repairs, management, and operating the works, nor did it determine or attempt to determine the cost of any extensions, enlargements, or other permanent improvements, nor did it, in fixing the rates complained of, adjust or attempt to so adjust them as that the net annual receipts and profits thereof to the complainant would be not less than six per cent. on the value of its water works and plant actually used and useful in the appropriation and furnishing of such water to consumers or any net annual receipts or profits whatever; that the board acted upon the protest filed by the consumers and the proof made thereunder, and, in violation of the provisions of the state statute, arbitrarily, unjustly, and without right so fixed the rates by the ordinance complained of as to provide for the expenses of operating and managing the complainant's plant, but so as to return to the complainant no net profit or to make good or in any way provide for the natural depreciation of the plant. The bill alleges that the total receipts that can be derived by the complainant from the city of National City and its inhabitants under rates fixed by the Board of Trustees of that city, will not exceed the sum of $25,000 per annum; that is to say, $11,800 from consumers outside of the city of National City.

It is alleged that the annual reasonable expenses of the complainant, including the cost of repairs, replacements by reason of depreciation, management, and operation of the property, have amounted to not less than $20,000, and will amount to that sum or more, for the year to come; that the cost of putting in the distributing system within the city of National City, not including the costs incurred outside of the limits of the city, amounted to the sum of $183,753.90; that the annual depreciation of the entire system amounts to not less than $44,000, and that the value of the entire property is $1,026,022.79."

Record, p. 48.

And after thus stating the facts as set forth in the bill, the court uses this language:

"These specific averments certainly tend strongly to support the allegations of the bill to the effect that at the rates established by the ordinance complained of the entire revenue that can be collected by the complainant will yield no net income, and will be in-

sufficient to defray the annual cost of operating and maintaining the plant and make good its annual depreciation by wear and tear. These averments are admitted by the demurrers; they may not be true in fact, but for the present purposes are to be accepted as true. So taking them, it cannot be doubted, I think, that the bill makes a good case. Individuals, companies and corporations who engage in the business of furnishing water to the public under the provisions of the constitution and statutes of the State of California, do so, as this court has of late had frequent occasion to observe, subject to the right on the part of the public instrumentalities to fix the rates at which the water shall be so furnished; but with the guarantee afforded by that paramount provision of the 14th amendment of the constitution of the United States, which, in effect, declares that such rates shall not be so fixed as to deprive the person furnishing the water of his property without just compensation."

Record p. 49.

And summing up the law as applicable to the facts alleged, and in holding the bill to be sufficient, the court says, further:

"It is, no doubt, a difficult matter to, at all times, fix rates that will be just both to the consumers, who constitute the public, and to those who furnish the money and perform the service. Perhaps in such matters, as in some others, absolute justice is unattainable. But, certainly, as near an approach to it ought to be made as is practicable. This can only be done by all parties in interest approaching the problem in a spirit of fairness. It is not only right to do so, but, from the low standpoint of policy, it is best. While the presumptions of law are always in favor of the rates established by the regularly constituted authorities, yet when they are shown to be manifestly unreasonable they must always be annulled as unjust, at the suit of the aggrieved party.

The duties devolved upon the defendant Board of Supervisors by the State statute already referred to are plainly pointed out and prescribed. There is not found among them that of considering or deciding legal rights that properly pertain to the court for decision."

Record p. 50.

It is perfectly evident from the views of the court, as here expressed, that the court understood the law to require that a reasonable return should be provided for by the rates, over and above all operating expenses, and making due allowance for the depreciation of the plant from wear and tear. The court then, as it appeared to do later on, overlooked entirely the direct and posi-

tive provision of the statute that the rates should be so fixed as to return to the company not less than six nor more than eighteen per cent. net upon the value of the plant. We undertook to convince this court, in the case of San Diego Land and Town Co. v. National City, that it was not the present value of the plant that should be taken into account, but its reasonable and necessary cost, which was the amount that was expended by a company of this kind for the benefit of its consumers. That view was not adopted by this court, but it was held that the present value of the plant should be taken as the basis, considering also the depreciation of the plant and its value to the consumers of water. But in none of the cases dealing with this important question has it ever been held that rates which do not meet the actual expenses of the company and its loss by depreciation are reasonable or just rates, until now. The bill alleged in terms, as shown by the extracts from the opinion quoted above, that the rates fixed by the Board of Supervisors would return nothing to the company over and above its operating expenses and the depreciation of its plant. The court held that these allegations in the complaint entitled the company to have the rates declared unreasonable and void. The evidence supported these allegations fully and clearly. The situation is summed up in a few words in the testimony of Mr. Boal, the manager of the company, who says in his sworn testimony:

"Q. Mr. Boal, can the company realize any profit at all upon a rate of $3.50 per acre, in connection with the domestic rate that prevails?

A. It cannot.

Q. Is it not true as a matter of fact that at that rate in supplying all the water that the company will be able to supply, taken in that way, the company would be losing money constantly?

A It certainly would, taking the replacements that are now needed,—will be needed.

Q. These replacements are necessary in order to supply the waters to consumers, are they not?

A. They certainly are."

Record p. 385.

The statute under which these rates were fixed, as we have shown, peremptorily required that the Board of Supervisors, in fixing the rates, shall estimate as near as may be the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water; also, the annual reasonable expenses, including the cost of repairs, management, and operating of such works, the actual cost of any extensions, or additions to the works, and that it shall, as near as may be, so adjust the rates that the net annual receipts and profits thereof to the said persons, companies, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent. upon the said value of the canals, etc.

The court in its opinion fully recognizes the requirements contained in this statute; but as we submit, erroneously holds that the value may be reached by taking the assessed valuation of the property and the price at which the property was sold in the re-organization of the company and payment of its debts by its stockholders.

The condition of the evidence and the basis upon which the decision of the court is rendered are thus summed up by the court in its opinion upon the final decision of the case, giving what was established by the evidence of the appellant company, and what the court finds was established by the petitioners, as follows:

"Much evidence was given before the Board of Supervisors by and on behalf of the respective parties to the proceeding. Among other things, it was shown on behalf of the company what the original cost of the plant was; the percentage of depreciation; the annual expenses of repairs, management, and operation, and the cost of extensions and enlargements and other permanent improvements of the works; and on the part of the protestants it was, among other things, shown that the entire plant was for the year in question assessed upon the county assessment roll of the county at $155,000, and further that the present complainant acquired the entire property of the Kansas corporation, including its lands, for $889,163.33. The rate fixed by the Board of Supervisors for the

water for irrigation purposes was $3.50 per acre per annum, which rate the complainant seeks by the present bill to have annulled on the ground that it is so low as to amount to the taking of its property without just compensation, contrary to the provisions of the constitution of the United States. To the bill the defendants filed exceptions and also demurrers, all of which were overruled by the court, with leave to the defendants to answer. The 25 defendants who initiated by petition the proceedings before the supervisors resulting in the fixing of the rates sought by the bill to be annulled did not answer the bill, and default was entered against them soon after the time for their appearance expired. The members of the Board of Supervisors alone made answer to the bill, putting in issue many of its material averments, and alleging, among other things, that the complainant's plant was not worth to exceed $250,000. On the trial of the issues thereby made in this case, evidence was also given on behalf of the complainant as to the cost of the water system, the percentage of the depreciation of the plant, the annual expenses for repairs, management, and operation, and as to the costs of the permanent improvements thereto; and evidence was also given on behalf of the defendants tending to show that the plant cost very much more than it was fairly worth, and that it could be replaced for less than two-thirds of its original cost."

The evidence as thus stated by the court does not differ in any material respect from the facts as alleged in the bill itself, and upon which the court had previously held that the complainant was entitled to recover.

The court also stated clearly and accurately the basis upon which the Board of Supervisors actually fixed the rates, as follows:

"It would seem from the testimony of Mr. Cherry, a member of the board that fixed the rates in question, that the board fixed its valuation of the company's plant at $350,000 largely upon a consideration of its assessed value of $150,000 for the purpose of taxation, and upon what the board thought was a fair proportion to be attributed to the water plant of the $889,163.33 for which the complainant acquired the entire property of the Kansas corporation; that it estimated and allowed for the maintenance and operation of the plant $13,442 a year; and that it estimated that the company's supply of water would irrigate 6,080 acres of land outside of National City, and found that it would receive $13,162 annually for the sale of water within that city. The board accordingly fixed $3.50 per acre as the annual rate to be paid for water for irrigation outside of National City, which, together with the amount received by the company for water furnished within the city, would meet the cost of maintenance and operation, and pay a

little more than 6 per cent. per annum upon a valuation of the plant of $350,000."

Which shows clearly that the Board of Supervisors did not estimate the actual value of the plant or attempt to do so, but that it arbitrarily took the assessed valuation and the price at which the property was sold under the circumstances above mentioned, as the basis upon which the rates were to be established. It further shows that in order to realize the base six per cent. that was allowed to the company upon the valuation of $350,000, the $3.50 per acre allowed was upon a supply of water by the company to 6,080 acres of land outside of National City, when as we have shown, the company had never at any time furnished more than 4,000 acres of land, or received rates for a greater number of acres than that mentioned. So in order to realize the minimum amount required to be furnished by the rates by the statute, there were included over 2,000 acres of land upon which the company had never received, and probably never will receive, rates at all, and taking this as the basis, the return amounted only to six per cent. on $350,000, which was less than one-third of the actual cost of the system of the company, and less than one-half of the amount the evidence shows would be necessary to replace the plant at the time the rates were fixed. And in addition to this, while the court below in its first opinion, above mentioned, expressly held the law to be that the depreciation of the plant from wear and tear should be considered in fixing the rates, and while the court seems to recognize the fact that at least a part of the depreciation proved in this case should have been charged up against the consumers, the evidence clearly shows that the Board of Supervisors made no such allowance, and that the company must bear a loss by depreciation of six per cent. upon its plant, while it is receiving barely that amount from the rates.

After reviewing the evidence and the basis upon which the rates were fixed by the Board of Supervisors, the court sums up as follows:

"In view of all the facts and circumstances of the case as disclosed by the evidence, and especially in view of the small quantity

of water available for use and actually furnished for irrigation outside of National City at the time the rates in question were fixed, which amount constantly decreased to the point of exhaustion, I do not think the court would be justified in holding it to be clear that the rates fixed by the Board of Supervisors will necessarily have the effect of depriving the complainant of its property without just compensation, unless it be, as is contended on the part of the complainant in another and similar suit pending in this court, and now under subdivision, entitled E. H. Spoor, receiver, against Board of Supervisors of Riverside county, *et al.*, that the statute of California above cited, and by virtue of which the proceedings before the supervisors were had, itself makes the cost of the plant the test of its value."

And closes by saying:

"Looking at the whole case, as the court must, I am unable to say that the rates prescribed by the Board of Supervisors here complained of will necessarily have the effect to deny just compensation to the complainant for the use of its property."

It does seem to us that this is a most remarkable conclusion from what has gone before. The opnion itself shows upon its face beyond any sort of question that the company could not realize one dollar in profits from the rates fixed by the Board of Supervisors. It shows beyond a doubt that it was only allowed a return upon $350,000, which is less than one-half of the actual value of the property, upon any just computation of its value; that that amount could be realized only if the company should be able to supply water to one-third more land than it was actually supplying or ever had supplied, and even then no return would be made to it for the depreciation of its plant. It can not be possible that these are just or reasonable rates. They were arrived at in violation of the express provisions of the law under which the Board of Supervisors acted. They do not return the amount required by that law. They do not, in fact, return any profit to the company, as the evidence clearly shows, and as the opinion of the court below demonstrates upon its face. And yet, because a Board of Supervisors had fixed these rates, and for no other reason that appears in the opinion, and out of respect for the conclusions reached by that body, the court below has held these rates to be reasonable and just within

the meaning of the constitution, and compels this company to furnish water to its consumers at an absolute and continuous loss. If these rates can be sustained, it is idle for any company supplying water to its consumers in the State of California to resort to the courts for relief in any case. If these rates are not unreasonable and unjust, it is fair to presume that no case can ever be presented to the courts of rates that are so unjust as to bring the case within the provisions of the constitution undertaking to guarantee these companies, together with all other citizens of the United States, against the taking of their property without just compensation. We submit that in no view that can be taken of the evidence in this case and the opinion of the learned judge of the court below can the conclusion reached by that court be justified or upheld. We respectfully ask, therefore, that the decree of the court below be reversed.

Respectfully submitted,

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